

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 8, 2008 Session

TAREQ DAJANI v. NEW SOUTH FEDERAL SAVINGS BANK

Appeal from the Circuit Court for Davidson County
No. 04C-2602 Thomas W. Brothers, Judge

No. M2007-02444-COA-R3-CV - Filed December 12, 2008

Consumer sued mortgagee-bank asserting a claim of negligence for mistakenly reporting to credit reporting agencies that his mortgage was in foreclosure. The trial court denied customer's second motion to amend his complaint based on futility and granted summary judgment in favor of bank. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

W.H. (Steve) Stephenson, II, Nashville, Tennessee, for the appellant, Tareq Dajani.

John R. Jacobson and Salvador M. Hernandez, Nashville, Tennessee, for the appellee, New South Federal Savings Bank.

OPINION

BACKGROUND

Tareq Dajani is the owner of property located at 914 Coarsey Drive in Nashville, Tennessee. In or about 1994, Mr. Dajani obtained a second mortgage on his Nashville residence with New South Federal Savings Bank ("New South"). On May 1, 2004, Mr. Dajani submitted a contract to purchase another property in Hermitage, Tennessee, with the intent to resell the property. He filed applications with two mortgage companies to obtain financing for the acquisition. To Mr. Dajani's surprise, both mortgage companies denied his application based on information received from third-party credit reporting agencies. It was then that he discovered New South mistakenly noted in its loan servicing system that Mr. Dajani's mortgage was in foreclosure and that the incorrect information had been reported to various consumer reporting agencies. As of 2004, Mr. Dajani was a customer in good

standing and had not previously defaulted on his mortgage payments to New South.¹ It is undisputed that New South's foreclosure notation was made in error.

Mr. Dajani filed a complaint against New South on September 8, 2004, alleging that New South negligently provided incorrect consumer information to credit reporting agencies. According to the complaint, Mr. Dajani was unable to purchase the Hermitage property, lost \$2,000 in earnest money, and lost any profits he would have made from the resale of the property as a result of the foreclosure notation and negative impact it had on his credit rating. Additionally, the credit limits on three of Mr. Dajani's credit cards were reduced, a reduction that he claims irreparably damaged his credit.

New South answered and later moved for summary judgment on January 31, 2007. Before responding to New South's motion for summary judgment, Mr. Dajani sought leave to amend his complaint on February 23, 2007, in order to include additional claims of breach of contract and libel and slander. At a hearing in March, New South argued that the amendment would be futile because Mr. Dajani's negligence and defamation claims were preempted by federal law under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C.A. § 1681 *et seq.*, which preempts a consumer's state law claims against furnishers of credit information.² See 15 U.S.C.A. §§ 1681t(b)(1)(F) and 1681h(e). Additionally, New South argued that amending the complaint to include a breach of contract claim would be futile because no provision in the agreement between the parties concerned its reporting obligation or imposed a duty that could have been breached by its reporting error.³ The trial court denied Mr. Dajani's motion to amend as being futile but continued New South's motion for summary judgment to allow time to conduct additional discovery.

Once discovery was complete, Mr. Dajani moved the court to reconsider his motion to amend,⁴ and New South renewed its motion for summary judgment. Mr. Dajani did not file a new proposed amended complaint but filed a response opposing summary judgment in which he argued that New South violated the specific provisions of 15 U.S.C.A. § 1681s-2(a). At a hearing on August 23, 2007, Mr. Dajani relayed the newly discovered facts surrounding the reporting error and argued that, even though he did not specifically plead any provision of the FCRA, New South had

¹Mr. Dajani held two loan accounts with New South. The mortgage at issue in this case was the second mortgage on the Hermitage property. New South records revealed one 10-day past-due notice but no late or 30-day past-due notices.

²Mr. Dajani did not specifically plead violation(s) of the FCRA in either his original complaint or his first proposed amended complaint.

³Mr. Dajani failed to reference or attach the contract he alleged New South breached as required by Tenn. R. Civ. P. 10.03 and failed to cite in the complaint actions constituting the alleged breach. In support of its position, New South attached the promissory note(s) and deed(s) of trust to its response in opposition to the amendment. Mr. Dajani does not appeal any issues related to a claim for breach of contract.

⁴Mr. Dajani filed a "Motion to Further Consider or Reconsider Plaintiff's Motion to Amend Pleading" on August 8, 2007 which the trial court treated as a motion to alter or amend the prior judgment.

notice of his FCRA claims because the language in the first proposed amended complaint was taken directly from 15 U.S.C.A. § 1681s-2. In an effort to clarify what claims were before the court and to allow New South an opportunity to properly respond, the trial court denied the motion to reconsider but directed Mr. Dajani to submit a new motion to amend clearly setting forth the applicable FCRA provisions. The trial court again reserved ruling on the motion for summary judgment.

A final hearing was held on September 21, 2007. In his second proposed amended complaint filed with the court, Mr. Dajani alleged New South violated the FCRA and cited only to the FCRA generally at “15 U.S.C.S. §§ 1681 *et seq.*” The arguments at the hearing centered on the application of either subsection 1681s-2(a) or subsection 1681s-2(b). The trial court concluded that the allegations fell under subsection s-2(a) which affords Mr. Dajani no private right of action and, finding no relief available under the complaint, granted New South’s motion for summary judgment and dismissed the action.

ANALYSIS

Mr. Dajani appeals two issues: (1) the trial court’s denial of his second motion to amend the complaint and (2) the trial court’s grant of summary judgment in favor of New South.

Standard of Review

The denial of a motion to amend the pleadings is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Hawkins v. Hart*, 86 S.W.3d 522, 532 (Tenn. Ct. App. 2001). The Tennessee Rules of Civil Procedure provide *inter alia* that parties may amend their pleadings to promote their notice-giving function, primarily with respect to the parties and claims. *See* Tenn. R. Civ. P. 15.01; *Walden v. Wylie*, 645 S.W.2d 247, 250 (Tenn. Ct. App. 1982). Rule 15 recognizes a liberal policy of allowing amendments to ensure claims are determined on their merits. *Hawkins*, 86 S.W.3d at 532. In ruling on a motion to amend, a trial court should consider several factors including any lack of notice to the opposing party, the repeated failure to cure deficiencies by previous amendments, any undue prejudice to the opposing party, and the futility of amendment. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 42 (Tenn. Ct. App. 2006). A trial court does not abuse its discretion in denying a motion to amend where the grant of the motion would be futile. *Forsythe v. Gibbs*, No. M2001-02055-COA-R3-CV, 2002 WL 1869415, *5 (Tenn. Ct. App. Aug. 15, 2002).

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Pub. Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party’s favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. If a factual dispute exists, we must determine whether the fact is material to the claim or defense

upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). The moving party has the burden of convincing the court that genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Byrd*, 847 S.W.2d at 215.

Private Right of Action under the Fair Credit Reporting Act

The trial court's decision to deny Mr. Dajani the opportunity to amend his complaint and grant summary judgment in favor of New South was based on its determination that Mr. Dajani was afforded no private right of action to pursue claims directly against New South. We agree.

The purpose of the FCRA is “to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . .” 15 U.S.C.A. § 1681(b). The duties set forth in the FCRA apply to consumer reporting agencies, users of consumer reports, and furnishers of information to consumer reporting agencies. *See* 15 U.S.C.A. § 1681 *et seq.* Entities, like New South, that furnish consumer credit information to consumer reporting agencies have a duty to provide accurate information.⁵ 15 U.S.C.A. § 1681s-2(a). However, Congress did not create a private right of action for consumer relief against violators of the provisions of subsection s-2(a). The FCRA limits enforcement of consumer reporting agencies' duty to supply accurate information exclusively to certain federal and/or state officers. 15 U.S.C.A. § 1681s-2(d); *Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999) (holding that victim of identity theft had no private right of action against creditor and collection agency for falsely reporting delinquency after notice of fraud).

Mr. Dajani argues on appeal that his state law claims survive federal preemption based on an exception in 15 U.S.C.A. § 1681h(e). Pursuant to subsection 1681h(e), except as set forth in subsections not applicable here, the liability of consumer reporting agencies is limited as follows:

[N]o consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency . . . *except as to false information furnished with malice or willful intent to injure* such consumer.

15 U.S.C.A. § 1681h(e) (emphasis added). In order for the italicized exception in 1681h(e) to apply, the consumer must allege that the furnisher acted “with malice or willful intent to injure” when it

⁵Furnishers of information also have a duty to investigate the accuracy of information they provide upon notice of a dispute received from a consumer reporting agency. 15 U.S.C.A. § 1681s-2(b). In this case, Mr. Dajani, the consumer, notified New South of the inaccurate information; therefore, subsection s-2(b) is inapplicable to this action.

supplied the false information. 15 U.S.C.A. 1681h(e); *Wolfe v. MBNA Am. Bank*, 485 F. Supp. 2d 874, 887 (W.D. Tenn. 2007) (holding that any and all state common law tort claims relating to the furnishing of credit information should be analyzed under § 1681h(e)).

Mr. Dajani's second proposed amended complaint does not specifically plead subsection 1681h(e) or contain an allegation that New South supplied the incorrect foreclosure information "with malice or willful intent to injure" Mr. Dajani. The only mention of malice came during the September 21, 2007 hearing. Mr. Dajani stated that New South acted "with malice or reckless disregard" when it allegedly continued to furnish the inaccurate information to credit reporting agencies after it received notice of the error.⁶ However, the statement was presented in the context of subsection 1681s-2. Throughout the September 21st proceeding, the parties limited argument to subsection 1681s-2, discussing whether the provisions of either (a) or (b) applied to the facts of this case.

It is well-settled that an issue not raised in the trial court will not be entertained on appeal. *See In re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn. 2001). The provisions of subsection 1681h(e) were never invoked at the hearing or in the proposed amended complaint and the only specific FCRA provisions referenced by Mr. Dajani either in support of his second motion to amend or in opposition to summary judgment were those under 15 U.S.C.A. § 1681s-2. Furthermore, Mr. Dajani failed to cite any portion of the record where he raised the malice argument or the exception under § 1681h(e) before the trial court as required by the rules of this court. Tenn. Ct. App. R. 6. Consequently, Mr. Dajani's argument that his claims avoid federal preemption pursuant to 15 U.S.C.A. § 1681h(e) is waived.

The trial court afforded Mr. Dajani multiple opportunities to amend his complaint and plead with specificity the FCRA provisions that New South allegedly violated. On August 23, 2007, the trial court directed Mr. Dajani to submit a new motion to amend "clearly setting forth the FCRA allegations that you are referring to in your reply brief." Instead, the proposed amended complaint referred only to the general codification of the FCRA. Considering the allegations as limited by the parties to 15 U.S.C.A. § 1681s-2, the trial court did not abuse its discretion in denying the motion to amend based on futility since Mr. Dajani has no private right of action against New South. *See Carney*, 57 F. Supp. 2d at 502. The only remaining claim from Mr. Dajani's original complaint was for negligence. As discussed above, the FCRA preempts a consumer from asserting a negligence claim against a furnisher of information. *See* 15 U.S.C.A. § 1681h(e). There being no genuine

⁶For purposes of 15 U.S.C.A. § 1681h(e), Tennessee courts have defined "malice" as in the context of defamation, meaning that "the furnisher 'either knows [the information] is false or . . . the [furnisher] acts in reckless disregard of its truth or falsity.'" *Wolfe*, 485 F. Supp. 2d at 887 (quoting *DiPrinzio v. MBNA Am. Bank, N.A.*, No. 04-872, 2005 WL 2039175, *5 (E.D. Pa. Aug. 24, 2005)). Mr. Dajani's own statement of undisputed material facts concedes that a New South employee "inadvertently and mistakenly marked on its computerized servicing statement that [Mr. Dajani's] second mortgage was in foreclosure." It is undisputed that the error was reported approximately four times between either December 2003 or January 2004 and May 2004 when the error was discovered. Furthermore, "a negligence claim, by its very nature, can never be intentional, that is, malicious or willful." *Wolfe*, 485 F. Supp. at 887.

dispute as to any material fact that would save Mr. Dajani's claims from federal preemption, we affirm the grant of summary judgment dismissing the complaint.

CONCLUSION

We have determined that the claims asserted against New South are preempted by the Fair Credit Reporting Act, 15 U.S.C.A. § 1681 *et seq.* We find no abuse in the trial court's discretion to deny the amendment as futile. Therefore, summary judgment was proper. We affirm the judgment of the trial court in all respects and remand to the trial court for any further proceedings consistent with this opinion. Costs of appeal are assessed against the appellant, Tareq Dajani, for which execution may issue, if necessary.

ANDY D. BENNETT, JUDGE